IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.368 OF 1994

Shri Bhiva Dama Pagi — Appellant (Org. Accused)

Vs.

The State of Maharashtra — Respondent

Mr.S.R.Chitnis for appellant.

Mr.R.Y.Mirza, APP for State.

CORAM: S.S.PARKAR & S.R.SATHE,JJ.

October 07, 2004.

ORAL JUDGMENT (PER S.S.PARKAR,J.)

1. The appellant convicted for offence under Section 302 of IPC and sentenced to life imprisonment has filed this appeal impugning the judgment and order dated 18/5/1994 delivered by the Addl. Sessions Judge, Thane in Sessions Case No.848 of 1993.

2. The prosecution case briefly narrated is as follows:

. The incident of assault had taken place in the afternoon of 6/11/1993 in village Takawal, Tal.

Palghar, Dist.Thane. The deceased Govind Bhoir had taken a sum of Rs.5/- from his wife PW 1and gone to the liquor shop of the accused which was near his house. Some quarrel took place between the deceased and the accused at the liquor shop when accused had assaulted the deceased with a stick in his abdomen and chest due to which the deceased fell down and died after some time. When the incident was going on PW 2 Kunda, the sister of wife of the deceased, heard the noise and, therefore, she rushed to the place and called wife of the deceased who is her sister. Hearing the commotion even son of the deceased PW 3 Ravindra had gone to the said place and daughter of the deceased PW 4 Kamala also had gone to the place of incident. On enquiry by complainant, the wife of the deceased, the deceased told her that accused had assaulted him. Injured Govind was brought to the house by his wife, son and daughter. After some time he succumbed to his injuries and, therefore, PW 1 complainant Anibai went to Manor police station and lodged her complaint (Exh.12) on the basis of which crime was registered at the said police station by PW 7 ASI Patil. After registering the complaint ASI Patil went to the house of Anibai and drew inquest

panchanama (Exh.19) and thereafter he drew spot panchanama (Exh.20). Stick (article no.1) was seized under the spot panchanama and thereafter he handed over the investigation to PSI Pawar on the same day at about 4.30 p.m. PSI Pawar then visited the place of offence and recorded the statements of witnesses including eye witness Kunda and others and arrested accused by 7.30 p.m. on that day. After completion of the investigation charge-sheet came to be filed in the Court of JMFC, Palghar on 29th November 1993 and the case was committed to the Sessions Court, Thane.

3. Before the Sessions Court charge was framed for offence under Section 302 of IPC against the appellant-accused to which he pleaded not guilty. At the time of trial eight witnesses were examined on behalf of the prosecution. PW 1 is Anibai, wife of the deceased. PW 2 is Kunda, who was an eye witness and the sister of PW 1. PWs 3 and 4 i.e. Ravindra and Kamala are son and daughter respectively of the deceased. PW 5 is Dr.Shah who conducted autopsy on the dead body and PW 6 is Satyanarayan Subhedar who acted as panch for inquest panchanama and spot panchanama. PW 7 ASI Patil and

PW 8 PSI Pawar respectively registered the complaint and investigated the offence. The defence of the accused was of simple denial.

4. Considering the evidence on record the trial Court has convicted the appellant-accused for offence under Section 302 of IPC and sentenced him to life imprisonment which is under challenge in this appeal.

5. After taking us through evidence on record the learned defence counsel firstly contended that there was no eye witness to the incident and the witnesses have gone at the place of offence after the assault was over. Secondly and mainly he contended that the offence committed by the appellant-accused cannot fall under Section 302 of IPC as the assault by the accused was neither intentional nor he can be said to have knowledge of the consequences of his assault. He submitted that the injury being grievous one which resulted in rupture of spleen the offence would be punishable under section 325 of IPC.

6. The incident had taken place in front of the

liquor shop of the accused which is hardly 80 ft. from the house of the complainant. According to the complainant, who is the wife of the deceased, her husband had taken a sum of Rs.5/- for drinking liquor from her at about 3 p.m. After some time she heard shouts of her younger sister Kunda PW 2 asking the complainant to run towards the house of the accused who was beating her husband. She immediately rushed to the house of the accused. When she reached there Govind was lying on the ground under a tree in front of the house of the accused. On her enquiry Govind told her that when quarrel was going on between accused and his wife he requested them not to quarrel and give him liquor and, therefore, the accused assaulted him. Thus immediately after the assault when complainant went to see injured Govind he told her on enquiry that accused had assaulted him. PW 2 Kunda is eye witness to the assault by the accused on Govind. Her house is hardly 40 ft. away from the house of the accused. At the relevant time she was sitting under a tamarind tree which was hardly 20 ft. away from her house from where the house of the accused was visible. She saw Govind standing in front of the house of the accused and there was talk between

Govind and the accused. She also saw accused giving stick blows on the person of Govind as a result of which he fell down. She, therefore, called Anibai telling her that her husband was being beaten by the accused. She has identified the muddemal article no.1 stick which was seized under the spot panchanama from the scene of offence. Thus PW 2 is an eye witness to the incident and she is a natural witness and her evidence has not been shattered in the cross-examination. The complainant, the wife of the deceased, has deposed about the oral dying declaration made to her that it was the accused who had assaulted him. Their evidence is further corroborated by PW 3 Ravindra, son of the deceased. He had brought water for his father. He deposes that his father told him that accused had given him stick blows on the chest, back and stomach. Similarly PW 4 Kamala, daughter of the deceased has deposed that on hearing the shouts and quarrel from near the house of the accused she went to the place of incident along with her mother. She corroborates the evidence of her mother that her father had told her mother that accused gave him stick blows. Thus the evidence of the above four witnesses leaves no doubt that it was the accused who had assaulted the

deceased with a stick. Their evidence is also corroborated by the medical evidence.

7. The prosecution has examined Dr.Shah who had conducted post mortem examination of the dead body. He found following two injuries on his person:

(1) Sub cutaneous Linear abrasion with sub cutaneous haemorrhage present over the 10th rib, on left side 2' x 1/2'.

(2) Sub cutaneous linear abrasion with sub cutaneous haemorrhage present over the 10th rib, on left side 1' x 1/2/'.

According to him the injuries were ante mortem. On internal examination he noticed that the spleen was ruptured horizontally in middle portion and grade II spleenomegaly was present. The blood was found in abdominal cavity (about 1 1/2 litres) which must be due to the rupture of spleen. According to Dr.Shah internal injury was corresponding to external injury mentioned by him and the cause of death was due to splenic rupture leading to excessive blood loss causing cardio respiratory arrest due to hypovolumic shock. According to the Medical Officer external injuries could be caused by hard, blunt and linear object like wooden stick (article no.1). Thus the medical evidence also supports the evidence of the eye witness and the other witnesses of the

prosecution. The prosecution had seized stick (article no.1) from the scene of offence which was used by the accused to assault the deceased.

8. The defence counsel contended that the prosecution has not proved motive beyond reasonable doubt because the complaint mentions that when accused tried to intervene in the quarrel between the accused and his wife he was assasulted by the accused. It was also stated by her in her examination-in-chief. However, in her cross-examination she has stated that the deceased Govind only told her that he was beaten by accused Bhiwa and nothing else. The said version in the cross-examination appears to have been given due to some confusion. In any case in view of the evidence of the eye witnesses and the other witnesses before whom oral dying declaration was made by the deceased and which is believable as it was incorporated in the complaint filed immediately within one hour from the time of incident, the proof of motive does not assume any importance.

9. The main question is as to what offence the accused can be said to have committed. PW 5 Dr.Shah

has in his post mortem report as well as in his deposition stated that the deceased was suffering from hydrocele which is a chronic disease but at the same time he has stated that the deceased could not have died due to fall on a hard surface. No doubt the accused had used stick to assault the deceased. The assault was made on the abdomen and on the chest. Therefore, it is difficult to attribute any intention to the accused. Moreover when stick blow was given on the chest as a result of which there was linear abrasion over the tenth rib it cannot be said that the accused had the knowledge that the assault which he made on the deceased was likely to result in death. It cannot be said that the accused had intention of causing such bodily injury to the deceased as he knew to be likely to cause death of the deceased in the ordinary course of nature. We are, therefore, of the view that the accused cannot be held guilty for offence of murder or culpable homicide not amounting to murder. Since there was rupture of spleen, the deceased had received grievous hurt within the meaning of section 320 of IPC. As the accused had used stick as a weapon of offence which is likely to cause death, the offence which can be said to have been committed by the

accused is voluntarily causing grievous hurt with dangerous weapon or means and, therefore, is liable to be punished under section 326 of IPC.

10. Mr.Chitnis submitted that there is passage of ten years since this appeal was filed in this Court and the accused being on bail this Court may impose lenient sentence. Considering that the act of the accused has ultimately resulted in the death of Govind, in our opinion, some adequate sentence will have to be awarded to the accused.

11. In the result, the appeal is partly allowed. While the order of conviction and sentence recorded by the Addl. Sessions Judge, Thane in Sessions Case No.848 of 1993 for offence under Section 302 of IPC is quashed and set aside, the appellant-accused is convicted for offence under Section 326 of IPC and sentenced to RI for three years and to pay a fine of Rs.25,000/- in default to suffer further imprisonment for one year. Out of the amount of fine when deposited by the appellant-accused, a sum of Rs.20,000/- shall be paid to PW 1 Anibai Govind Bhoir, widow of Govind Bhoir and in her absence to her children. The appellant shall surrender to his

bail forthwith. He shall be entitled to set off under Section 428 of Cr.P.C.

(S.S.PARKAR,J.)

(S.R.SATHE,J.)